11 USC 362
11 USC 547(b)
11 USC 547(c)
Agency
Interference with Contract

Marks v. Opti-Craft Civ. No. 89-1415-PA Adv. No. 88-0177-S7

In re Professional Eyecare Associates, No. 388-01280-S7

5/23/90 Judge Panner affirming Judge Sullivan's oral ruling

The district court affirmed Judge Sullivan's rulings that the defendant supplier did not tortiously interfere with contracts between the debtor and it's members, violate the automatic stay or receive preferential transfers except to the extent of one partial payment from the debtor.

The debtor was an organization that provided group discounts to it's members for eyecare products. The members placed orders directly with suppliers, the suppliers billed the debtor and the debtor billed the members. Shortly before the debtor filed chapter 11, OptiCraft sent a letter to the members directing them to pay OptiCraft for the previous month's orders. OptiCraft offered the same discount to the members that they would have received through the debtor. OptiCraft withheld the monthly statement from the debtor, so it could not bill the members.

The debtor was an agent of two disclosed principals, the buyers and OptiCraft, rather than a wholesaler. The members had an independant obligation to pay OptiCraft, so the payments directly to OptiCraft were not preferential even though they also satisfied the obligation from the debtor to OptiCraft.

OptiCraft did not tortiously interfere with the contracts between debtor and the members, because the debtor had already breached the contract with OptiCraft. The breach was legal justification for OptiCraft to collect directly from the members. OptiCraft did not violate the stay because all of it's actions were prepetition.

The timely partial payment made by the debtor to OptiCraft one month before filing was recoverable as a preference. A partial payment was not the ordinary course of dealing between the parties, and OptiCraft was aware that the debtor had financial difficulties.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re PROFESSIONAL EYECARE ASSOCIATES, INC., an Oregon corporation, Debtor.	No. 388-01280-S7
THOMAS G. MARKS, TRUSTEE, Plaintiff-Appellant, v. OPTI-CRAFT, INC., an Oregon corporation, Defendant-Respondent.	Adv. No. 88-0177-S7 Civ 89-1415 OPINION

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PANNER, J.

Bankruptcy Trustee Thomas G. Marks ("Trustee") appeals the final judgment of the Bankruptcy Court that certain payments made by members of debtor Professional Eyecare Associates, Inc. ("PEA") to Opti-Craft, Inc. ("Opti-Craft") were not voidable preferences under 11 U.S.C. § 547 (b), that Opti-Craft did not tortiously interfere with the contracts between PEA and its members, and that Opti-Craft did not violate the automatic stay. Opti-Craft cross-appeals the Bankruptcy Court's decision that a partial payment made by PEA to Opti-Craft is a voidable preference as a payment not made in the ordinary course of business, under 11 U.S.C. § 547 (c)(2).

I affirm the Bankruptcy Court's decision.

FACTUAL BACKGROUND

PEA incorporated in Oregon in 1985 as a membership organization of optometrists, ophthalmologists, and opticians. PEA generated volume purchases and obtained discounts from suppliers, so they were able to sell optical products to members at reduced prices.

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PEA had two divisions. One division stocked a general inventory of eyecare products, purchased from various suppliers. The other division was known as the buying group, and provided prescription lenses for eyeglasses. The buying group's transactions are the basis for this appeal.

The buying group functioned in the following manner. If a PEA member needed some prescription lenses for a patient, the member would place an order to a lab. The lab would grind the lenses, ship them to the PEA member, and then bill PEA for the purchase. PEA would pay the lab, and bill the member for the lenses on a monthly statement. These statements included all supplies ordered by the member, from every supplier.

One of PEA's major suppliers was Opti-Craft, an ophthalmic laboratory. On May 5, 1985, PEA and Opti-Craft entered a written agreement, which was revised on May 29, 1986. This agreement recognized Opti-Craft as the "preferred laboratory" for PEA members, and PEA agreed not to make available to any of its members any other ophthalmic labs in Idaho, Washington, Alaska, or Oregon. The latter agreement remained in effect until the parties ended their relationship in March, 1988.

The May 1986 agreement provided a 15% discount on the purchase price on all lenses purchased through PEA, provided the dollar volume of PEA purchases always exceeded $20,000.00 per month. Opti-Craft would send PEA a complete statement of the prior month's purchases by the fifth day of the month.

PEA would then include this information on the monthly bills it sent to its members. PEA would receive the full 15% discount if it paid the balance by the 15th of the month, with a smaller discount for payments made after that date. PEA would then bill its members, offering them an 11% discount if they made their payments by the 17th of the month.

PEA and Opti-Craft first began experiencing problems in September, 1987. An initial PEA check for the August 1987 goods was returned for insufficient funds. PEA was then negotiating either a sale or merger with Wellcorp., Inc., and Wellcorp paid the September 1987 amount due on behalf of PEA in two installments. Wellcorp also guaranteed PEA's October, 1987 payment, so Opti-Craft provided September's requested supplies to PEA members. Although the September 1987 payment was made after the 15th, and in two installments, Opti-Craft still allowed the full 15% discount.

The negotiations with Wellcorp did not result in a sale or merger. Opti-Craft began to worry about PEA's financial difficulties. Opti-Craft suggested PEA post a letter of credit for two months' purchases to protect Opti-Craft in case of a default. PEA refused, and Opti-Craft did not pursue the matter.

In January 1988, PEA sent Opti-Craft a check for $260,000.00 covering the balance of its members' December 1987 orders. PEA's president asked Opti-Craft to assure PEA's other creditors that PEA was able to pay its bills.

In February, 1988, PEA owed Opti-Craft $257,735.67 for members January 1988 orders. PEA sent a $100,000.00 check as partial payment on February 16. A second check for $157,735.67 was sent to Opti-Craft, dated February 22, but PEA lacked sufficient funds to cover the check. A third check was sent, this time for $100,000.00 and dated February 23. There were insufficient funds to cover this check. No other payment was made.

On March 1, 1988, Opti-Craft proposed a new agency agreement with PEA. Under the new agreement, Opti-Craft would be able to collect directly from PEA members, for all amounts billed retroactive to February 1, 1988. PEA would then receive a 4% commission for sales to PEA members. PEA refused the new agreement, and offered instead to create a joint bank account with Opti-Craft, into which all funds for Opti-Craft services from PEA members would be placed. Opti-Craft refused this alternative.

On March 3, Opti-Craft demanded that PEA either enter the agency agreement, or Opti-Craft would terminate their relationship. When PEA refused, Opti-Craft sent a letter to all PEA members directing them to pay Opti-Craft directly for their February purchases. PEA did not authorize this letter. Opti-Craft also did not send PEA a March statement for February orders by PEA members. By withholding the statement, Opti-Craft prevented PEA from billing and collecting from its members for February purchases.

Opti-Craft offered incentives for PEA members to pay Opti-Craft directly. Opti-Craft allowed the 11% discount the member would have received had the payment been made to PEA and paid on time. The member would not normally have earned this volume discount had the member dealt directly with Opti-Craft. Opti-Craft also sent a $25.00 coupon to PEA members which they could use in paying Opti-Craft for the member's February invoice.

PEA filed for bankruptcy on March 16, 1988.

Opti-Craft collected at least $312,408.00 from PEA members for goods purchased through PEA and shipped between February 1, 1988 and March 3, 1988. The trustee claimed that amount is a voidable preference under 11 U.S.C. § 547(b). Additionally, the trustee sought damages based on Opti-Craft's conduct: $8,500.00 for goods ordered by PEA members through PEA before March 3, 1988, but shipped after that date; $7,575.00 for unauthorized credits given to PEA members in the form of the $25.00 coupons; and $35,981.00 for unauthorized discounts based upon Opti-Craft giving PEA's discount to members. Finally, the trustee sought to void the February 16 partial payment, as it was within the preference period, and not in the ordinary course of business.

The Bankruptcy Court ruled against the trustee, holding that PEA members were directly liable to Opti-Craft for orders placed through PEA. The relationship between PEA and Opti-Craft was not "buyer and seller." Instead, PEA acted as a

dual agent between the members and Opti-Craft. Therefore, the payments were not voidable preferences, and Opti-Craft did not tortiously interfere with the contracts between PEA and its members. However, the Bankruptcy Court did hold the February 16 payment was a voidable preference. Opti-Craft could not show the payment was in the ordinary course of business, and therefore excludable from the bankruptcy estate under 11 U.S.C. § 547(c)(2).

Trustee appeals the ruling on several grounds. Opti-Craft cross-appeals, claiming the February 16 payment was not voidable.

STANDARD OF REVIEW

This court must uphold the Bankruptcy Court's findings of fact unless they are clearly erroneous. Conclusions of law are reviewed de novo. Daniels-Head & Assoc. v. Mercer, Inc. (In re Daniels-Head & Assoc.), 819 F.2d 914, 918 (9th Cir. 1987). The party seeking review of the Bankruptcy Court's decision bears the burden of proof. In re Van Rhee, 80 Bankr. 844, 846 (W.D. Mich. 1987).

The parties cannot agree which are factual findings, and which are legal conclusions. Opti-Craft argues the Bankruptcy Judge's dismissal of the Trustee's claims were "factual findings", based on the fact that PEA had an "agency" relationship with its members. However, the Bankruptcy Judge's decision that PEA's February payment was not "in the

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ordinary course of business" under 11 U.S.C. § 547(c)(2), was a legal conclusion, and therefore merits de novo review.

The Trustee argues that while the Bankruptcy Judge referred to his conclusions as "findings", that label is not controlling on this court. The Bankruptcy Judge's conclusions were based on applying a legal framework to undisputed facts, and therefore should be reviewed de novo. Trustee agrees that Opti-Craft's claim under § 547(c)(2) is a purely legal question, and merits de novo review.

I need not resolve this dispute, as I would affirm the Bankruptcy Court's decision under either standard.

DISCUSSION

I. Trustee's Appeal

A. Payments by PEA members to Opti-Craft were not a preference under § 547(b).

The bankruptcy trustee will void as preferential any transfer of a debtor's property made within ninety days before the petition is filled, unless specifically exempted by the Bankruptcy Code. 11 U.S.C. § 547 (b). However, a transfer is preferential only if the property or the interest in property transferred belongs to the debtor. Payments made by a contract debtor of a bankrupt to a creditor of the bankrupt do not become part of the bankruptcy estate where there is an independent obligation on the part of the debtor to pay the creditor. In re Flooring, 37 Bankr. 957, 961 (Bankr. 9th Cir. 1984).

The agreement between PEA and its members described PEA as "an organization which permits participants to purchase supplies at reduced prices." The agreement also included the following language: "The reduced prices are possible because of the volume purchases by the participants of PEA" (emphasis added). The individual doctors who were members of PEA contacted Opti-Craft directly, and placed their orders for lenses. Each lens shipment to a PEA member included an invoice from Opti-Craft. Lens prices were set by Opti-Craft. Opti-Craft also reserved the right to refuse shipment to any PEA members, if it so desired. In light of the terms of this agreement, the Bankruptcy Court concluded the individual PEA members who purchased lenses from Opti-Craft were the "buyers", and not PEA itself. That is correct.

The agreement between Opti-Craft, PEA, and the members was not a contract for the sale of goods, as in the usual manufacturer/wholesaler/retailer relationship. PEA was an agent of both the buyer and seller; it had a dual agency role to furnish buyers to Opti-Craft, and to furnish discounts to buyers who placed orders with Opti-Craft. See Restatement (Second) of Agency, § § 14 (j) and 14 (k). The members were disclosed principals ordering through their agent, PEA, leaving the members still directly liable to Opti-Craft. The true sale was between Opti-Craft and the PEA member. PEA members were contractually liable to Opti-Craft, independent of their liability to PEA.

Nevertheless, the trustee asserts that the parties intended for PEA to be considered a wholesaler, and argues that the demands of the optical industry require this type of arrangement. To compete with in-house labs providing one-hour service, eyecare professionals need a quick turn-around time on prescription lenses. Because each set of lenses must conform not only to a unique prescription, but also to a specific set of glass frames, PEA members had to deal directly with Opti-Craft. Therefore, it is the demands of the industry, not the intentions of the parties, that dictate this form of operation.

This argument is irrelevant. If the eyecare market is as the trustee portrays it, and only the type of financing arrangement utilized by the parties in this case will work, then only agency forms of financing can be utilized. There is no applicable exception in the law of agency for the eyecare industry. PEA had two divisions for a reason. General eyecare products can be purchased, stored, and resold while eyeglass lenses cannot. Therefore, PEA's buying division must be construed as an agency relation between PEA members and Opti-Craft.

Because PEA members were independently obligated to Opti-Craft for the lenses they ordered, their direct payments to Opti-Craft cannot be considered as taking anything away from the bankruptcy estate. These payments were not preferential, even though they satisfied a debt of PEA to Opti-Craft.

Members were also satisfying their own obligations to Opti-Craft.

B. Opti-Craft did not tortiously interfere with the contracts between PEA and PEA members.

Trustee also appeals the Bankruptcy Court's decision that Opti-Craft did not tortiously interfere with PEA's contracts with its members. Trustee argues PEA had an existing business relationship with its members, Opti-Craft interfered with that relationship with an improper motive, and used improper means, causing PEA to suffer damages beyond the interference itself. See Ron Tonkin Gran Turismo v. Wakehouse Motors, 46 Or. App. 199, 208, 611 P.2d 658 (1980). Trustee argues Opti-Craft used the following improper means to interfere with contracts between PEA and PEA members. First, Opti-Craft refused to send PEA a statement of orders by PEA members, which made it impossible for PEA to bill its members. Second, Opti-Craft offered discounts and a $25.00 coupon as inducements for PEA members to pay Opti-Craft directly, depriving PEA of its funds.

However, PEA had already breached their contract with Opti-Craft. The breach was legal justification for Opti-Craft to withdraw PEA's authority to collect the outstanding accounts, and allow Opti-Craft to collect directly from the members. See Daniels-Head, 819 F.2d at 919.

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C. Opti-Craft Did Not Violate the Automatic Stay

Once a bankruptcy petition is filed, 11 U.S.C. § 362 operates as an automatic stay of most proceedings against the bankrupt. Creditors are blocked from initiating or continuing lawsuits, or any acts to obtain possession of the bankrupt's property.

PEA filed for Bankruptcy on March 16, 1988. All disputed actions by Opti-Craft took place before that date. Any moneys from PEA members that Opti-Craft received after that date were due to the pre-petition contacts.

II. Opti-Craft's Cross-Appeal

Opti-Craft claims that a timely partial payment is still within the ordinary course of business, under 11 U.S.C § 547(c)(2). Congress enacted § 547(c)(2) to prevent the trustee from voiding debtor's payments "in the ordinary course of business." This section recognizes that payments by business and non-business debtors on open credit purchase plans and to routine creditors such as utilities do not violate the policies of § 547. However, any payment that deviates substantially from the payment history of the debtor is subject to question, particularly where the creditor is aware of the debtor's deteriorating financial condition. White & Summers, Uniform Commercial Code, § 23-5 (West, 3rd Ed. 1988).

Opti-Craft has not shown that the $100,000.00 payment in February, 1988 was in the ordinary course of business, within

the meaning of § 547(c)(2). While the payment was made on the customary date (allowing for the fact February 15, 1988 was a holiday), it was only a partial payment. Such a payment was outside the ordinary course of business of these parties, and therefore preferential under § 547(b). In re Economy Milling Co., Inc., 37 Bankr. 914 (D. S.C. 1983); Waldschmidt v. Rainer (In re Fulghum Const. Corp.), 78 Bankr. 146, 152 (M.D. Tenn. 1987); In re Gull Air, Inc., 82 Bankr. 1 (Bankr. D. Mass. 1988).

CONCLUSION

PEA members were independently obligated to Opti-Craft for the lenses the members ordered. Therefore, the members payments directly to Opti-Craft do not constitute a preference under § 547(b). Opti-Craft did not tortiously interfere with PEA's contract with the PEA members. PEA had already breached its contract with Opti-Craft, so Opti-Craft was entitled to directly contact PEA members. Opti-Craft did not violate the automatic stay. Finally, PEA's February 1988 partial payment was not in the ordinary course of business under § 547(c)(2), and therefore is a voidable preference.

The Bankruptcy Court's decision is affirmed.

DATED this 22 day of May, 1990.

OWEN M. PANNER, United States
District Court Judge